

# ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Wayne Analyst: Kristina North Bill Number: AB 486  
Related Bills: None Telephone: 845-6978 Introduced Date: 2/18/99  
Attorney: Doug Bramhall Sponsor: CA Law Review Commission

**SUBJECT:** Administrative Law/State Agency Advisory Interpretations

## SUMMARY

Under the Government Code, Administrative Procedures Act (APA), this bill defines and allows a state agency to adopt an advisory interpretation upon completion of specified procedures. This bill also would allow an interested person to petition a state agency to adopt an advisory interpretation.

## EFFECTIVE DATE

This bill would be operative on January 1, 2000.

## SPECIFIC FINDINGS

**Current state law** allows a state agency to adopt, amend or repeal regulations (every rule, regulation, order or standard of general application) and provides a procedure by which the agency may adopt, amend or repeal the regulation, including Office of Administrative Law (OAL) review.

**Current state law** provides that any interested person may petition a state agency requesting the adoption, amendment or repeal of a regulation, except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for a petition is otherwise prescribed by statute. The APA requires that the state agency notify the petitioner in writing of the receipt of the petition and either 1) deny the petition in writing within 30 days, indicating why the agency has rendered its decision on the merits of the petition, or 2) schedule the matter for public hearing in accordance with specified notice and hearing requirements.

**Current state law** provides that any interested person may obtain a judicial declaration determining the validity of any regulation disapproved or repealed by OAL by bringing an action for declaratory relief in the superior court.

**Current state law** specifically excludes from the definition of the term "regulation" any "legal rulings of counsel" issued by the Franchise Tax Board (FTB) or the State Board of Equalization (BOE).

**Current state law** allows a taxpayer to make a written request to the FTB for a general clarification of the tax laws administered by the FTB (Information Letter) or the specific application of those laws to a proposed transaction contemplated by the taxpayer (Chief Counsel Ruling).

Board Position:

|                  |                   |                       |
|------------------|-------------------|-----------------------|
| <u>      </u> S  | <u>      </u> NA  | <u>      </u> NP      |
| <u>      </u> SA | <u>      </u> O   | <u>      </u> NAR     |
| <u>  X  </u> N   | <u>      </u> OUA | <u>      </u> PENDING |

Department Director

Date

Gerald Goldberg

4/1/1999

If the taxpayer meets certain specified requirements and relies on these forms of written advice from the Franchise Tax Board, the taxpayer may be relieved of interest and penalties in the case of Information Letters and taxes, interest and penalties in the case of Chief Counsel Rulings. FTB rulings generally follow the federal ruling scheme provided in the Internal Revenue Code.

**This bill** defines an advisory interpretation as a written agency statement, adopted pursuant to the procedure provided, expressing the agency's opinion of the meaning of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers or by which the agency is governed.

**This bill** would allow a state agency to adopt an advisory interpretation and provides the procedure by which a state agency could adopt the interpretation.

An advisory interpretation would 1) have no precedential legal effect; 2) not be entitled to judicial deference; 3) not prescribe a penalty or course of conduct; 4) not confer a right, privilege, authority, exemption or immunity; and 5) not impose an obligation, or bind or compel in any way the public. However, an agency would be bound by an advisory interpretation in an enforcement action or adjudicatory proceeding (except where the advisory interpretation is inconsistent with a published opinion of the California Supreme Court or the California Court of Appeal regarding the same law).

If adopted, an advisory interpretation would remain in effect until 1) it is repealed; 2) disapproved or superseded by statute or regulation; 3) contradicted by a published opinion of the California Supreme Court or a California Court of Appeal; or 4) disapproved by OAL and the notice of disapproval is published in the California Regulatory Notice Register.

**This bill** would not require an agency to adopt an advisory interpretation, and an advisory interpretation would not be the only method by which an agency could express its interpretation of a statute, regulation, agency order, court decision, etc.

**This bill** would allow an interested person to petition a state agency to adopt an advisory interpretation issued by the agency. The state agency would be required to notify the petitioner in writing of the petition's receipt and, within 30 days and in writing, either deny the petition on its merits, explaining the agency's decision, or schedule the matter for public comment. Any decision made by the agency regarding a petition requesting adoption must be transmitted as soon as practicable to OAL for publication in the California Regulatory Notice Register.

**This bill** would allow an interested person to obtain a judicial declaration on the validity of an advisory interpretation, reviewed or declined to be reviewed by OAL, by bringing an action for declaratory relief in the superior court. An advisory interpretation could be declared invalid for failure to meet the requirements for its adoption or for inconsistency with the provision of law it interprets.

### **Implementation Considerations**

The following implementation considerations have been identified:

- ◆ The Revenue and Taxation Code currently provides for written request by taxpayers for general or specific information, which generally follows the IRS method for providing taxpayer guidance. This bill's procedure could be confusing to taxpayers since taxpayers already have a statutory vehicle for obtaining written guidance concerning tax laws. Moreover, existing law provides a remedy for relief of interest and/or taxes that would not be available to the taxpayer through the procedure created by this bill.
- ◆ If an advisory interpretation is not approved by OAL, this bill does not specify how or if the written agency interpretation would be impacted.
- ◆ The bill may create confusion between the department's current practice of issuing Legal Rulings in reliance on the APA exception to the definition of "regulation," a practice unaffected by this bill, and the "advisory interpretation" scheme added by this bill.
- ◆ This bill would provide that the advisory opinion would be available through OAL; however, this may violate existing non-disclosure statutes prohibiting the disclosure of taxpayer information to the extent that confidential tax information is contained in the opinion.

Department staff is available to assist the author's office in resolving these and any other concerns.

### **FISCAL IMPACT**

#### **Departmental Costs**

If this program is enacted into law, it would be administered within the Legal Branch of the department. Costs associated with its implementation could be substantial. Actual cost would be determined by the number of requests received, and the time required to process the request. The procedures associated with the issuance or refusal to issue "advisory interpretations" are substantially the same as those applicable to the issuance of regulations. It is assumed that requests would involve relatively complex issues, since simple issues can be addressed by existing methods of communications with taxpayers. Moderately complex regulations currently require a minimum of 200 attorney staff hours to complete, and more complex regulations require a minimum of 500 attorney staff hours to complete. If similar timeframes are required to issue "advisory interpretations, and ten requests are processed in a year, total attorney staff hours required to handle the workload would range 2000 to 5000 hours, or between 1.12 and 2.8 personnel years (py) and support staff required would be between .5 and one py for a total first year implementation cost of between \$143,000 and \$342,000.

**Tax Revenue Estimate**

This bill would not impact the collection of state income tax revenue.

**BOARD POSITION**

At its March 23, 1999, meeting, the Franchise Tax Board voted 2-0 to take a neutral position on this bill as introduced February 18, 1999.